

No. 20999

---

---

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

CONTINENTAL CASUALTY COMPANY,  
*Appellant,*

v.

JESSIE GIDDINGS THOMPSON,  
*Appellee.*

FILED

SEP - 2 1966

WM. B. LUCK, CLERK

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Judge*

---

REPLY BRIEF OF APPELLANT:  
CONTINENTAL CASUALTY COMPANY

---

SKEEL, McKELVY, HENKE, EVENSON  
& UHLMANN  
W. PAUL UHLMANN  
*Attorneys for Appellant*

Office and Post Office Address:  
1020 Norton Building  
Seattle, Washington 98104

FEB 15 1967



## SUBJECT INDEX

	<i>Page</i>
Re Statement Of Case.....	1
Re Appellee's Counterstatement Of Case.....	2
Arguments .....	3
(1) Construction of Insurance Contract.....	3
(2) Reply to Appellee's Arguments.....	4
Conclusion .....	5
Certificate .....	6

## TABLE OF CASES

<i>Evans v. Metropolitan Life Insurance Company,</i> 26 Wn.2d 594, 174 P.2d 961 (1946).....	3-4
<i>Pan American Life Insurance Company v. Andrews,</i> 340 S.W.2d 78 (1960).....	4-5



IN THE  
**United States Court of Appeals  
For the Ninth Circuit**

---

CONTINENTAL CASUALTY COMPANY,  
*Appellant,*

v.

JESSIE GIDDINGS THOMPSON,  
*Appellee.*

---

No. 20999

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Judge*

---

**REPLY BRIEF OF APPELLANT:  
CONTINENTAL CASUALTY COMPANY**

---

LEGEND OF ABBREVIATIONS USED IN BRIEF

R.T.—Reporter's (Court) Transcript of evidence and proceedings in U. S. District Court (typewritten).

**RE STATEMENT OF CASE**

Appellant is astounded by the statement appearing in Appellee's brief relative to the alleged Travelers Insurance Company accident policy on the life of the deceased, Ralph Edward Thompson. In referring to that policy, Appellee stated on page 2 of the brief, under the heading Background of Litigation,

“Travelers Insurance Company paid the accidental death benefits to the beneficiary in the amount of \$5,000.”

Apparently the inference sought to be implied by that statement is that if Travelers Insurance Company paid an accidental death claim under an accident policy, payment should also have been made under the policy which is the subject of this litigation. Even if the statement made is a fact, it has no relevancy in this case. There is no evidence on that subject in this record. None was even offered. The terms of the Travelers Insurance Company policy are not before this Court; and we can only assume, therefore, that the risk was fully covered thereunder. None of the facts or circumstances with respect to either the fact or reasons for such payment are in this record. Appellant respectfully submits, therefore, that the statement is not only immaterial and irrelevant but also improper because it goes outside the record and this Court must, therefore, wholly disregard it.

### **RE APPELLEE'S COUNTERSTATEMENT OF CASE**

On page 4 of Appellee's Brief under the heading of Summary of Facts is the statement that

“... Thompson met his death due to bodily injury caused by accidental means.”

Appellee makes no reference in the brief to any testimony in support of that statement. The only direct evidence in the record on that subject is that the insured did *not* suffer bodily injury. There is no evidence that he fell or was thrown against or was struck by or came in contact with any foreign object. Appellant reviewed in detail all of the evidence in this case on that subject on page

9 of its opening brief. Furthermore, the insured did not complain of any bodily injury (R.T. 163) and his examining physician found no evidence of any injury either to the insured's body or brain (R.T. 165). The insured's attending physician testified that the "psychic trauma" which the insured suffered was something "*within the mind*" and had to do with his *thinking* rather than any part of his *body or brain* (R.T. 164-165). The expert psychiatrist, Dr. Strand, called by plaintiff also testified "that psychic trauma would represent a stress reaction on the part of the individual initially at the *mind* or *mental* level." (R.T. 272)

The policy in this action obligates the insurer only for "loss resulting directly and independently of all other causes" from "bodily injury" which is "caused by accident." The policy by its terms does not insure against loss caused by "psychic trauma" or "shock" or any loss which is induced by processes within the "mind" or as a result of any imbalance of the thinking processes.

## ARGUMENTS

### (1) Construction of Insurance Contract

Supplemental to the authorities cited in Appellant's Opening Brief on the matter of construction of an insurance contract, attention is invited to the language of the Supreme Court of the State of Washington in *Evans v. Metropolitan Life Insurance Company*, 26 Wn.2d 594, 174 P.2d 961 (1946). At page 604 the Court said

"1. It is self-evident that (1) an insurance policy is merely a written contract between an insurer and an insured; (2) courts cannot rule out of the con-



tract any language which the parties thereto have put into it; (3) a court is not at liberty to revise a contract under the theory of construing it; (4) neither abstract justice, nor any rule of construction, justifies the creation of a contract for the parties which they did not make themselves, or *the imposition upon one party to a contract of an obligation not therein by him assumed*. The words and terms as used in the contracts must be construed in their ordinary and popular sense.” (Emphasis supplied)

## (2) Reply to Appellee’s Arguments

In referring to the Texas case *Pan American Life Insurance Company v. Andrews*, 340 S.W.2d 78 (1960), Appellee attempts to distinguish it on the basis of differences in language in the insuring provisions. The two policies which were before the Court in the *Andrews* case do contain some language not included in the policy at bar. The two *Andrews* policies required that the “bodily injury” must have been occasioned by “external, violent and accidental means;” whereas, in the policy at bar it is required only that the “bodily injury” be caused by “accident.” The two *Andrews* policies each contain specific exclusions in instances of “bodily injury” “of which there is no visible contusion or wound on the body, except in the case of drowning or internal injuries revealed by autopsy.” Thus, even under the two policies in the *Andrews* case, recovery could be effected even in the absence of visible contusions or wounds on the body if death resulted from drowning or internal injuries disclosed by autopsy. In commenting on the exclusion provisions, the Texas Court stated with respect to the autopsy requirement, at page 792 of the opinion:



“(4) The provision for autopsy is to afford the opportunity for establishing the fact that death was caused by a physical force where there was no outward manifestation on the body of that force. Otherwise no recovery could be had for an accidental death caused by taking into the body poisonous substances or for other injuries sometimes caused to internal organs of the body or by external physical force without any visible contusion or wound. *The provision for autopsy was not to set up a new category of injuries such as mental shock, but simply as a means of determining that death did result from some physical and violent force.*” (Emphasis supplied)

Notwithstanding the differences in the wording in the *Andrews*’ policies, from that of the policy at bar, the underlying reasons for the conclusions reached in the *Andrews* case are certainly applicable to our present case. *Andrews*’ death did not result from “bodily injury” caused “directly and independently of all other causes” from external, violent and accidental means—it resulted from an intervening mental or psychic condition which was the same type of psychic condition or mental reaction which intervened and was the direct cause of the death of Mr. Thompson in the case at bar.

### CONCLUSION

Based on the record in this case and the authorities cited, Appellant submits that the judgment of the trial court should be reversed.

Respectfully submitted,

W. PAUL UHLMANN

*Of Attorneys for Appellant*

**CERTIFICATE**

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and, that in my opinion the foregoing brief is in full compliance with those rules.

Respectfully submitted,

W. PAUL UHLMANN

*Of Attorneys for Appellant*